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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

In re JAMES BLODGETT, Superintendent of
Washington State Penitentiary, Walla Walla,
Washington, and KENNETH O. EIKENBERRY,
Attorney General of the State of Washington,
Petitioners.

**RESPONSE TO PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT AND TO THE HONORABLE
PROCTER HUG, JR., CECIL F. POOLE, AND CYNTHIA
HOLCOMB HALL, CIRCUIT JUDGES**

Circuit Judges PROCTER HUG,
CECIL F. POOLE and
CYNTHIA HOLCOMB HALL

United States Court of Appeals
for the Ninth Circuit
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I

SUMMARY OF ARGUMENT

This petition requests a writ of mandamus compelling the Ninth Circuit Court of Appeals to decide the pending appeal of *Campbell v. Blodgett*, No. 89-35210, which seeks review of denial by the district court of a petition for writ of habeas corpus. However, the Ninth Circuit Court of Appeals properly concluded that the most efficient and expeditious method to consider this case was to withdraw it from submission pending any appeal from the district court's disposition of a further habeas corpus petition brought by the same appellant that is presently pending before that court. This Court should therefore deny this petition for a writ of mandamus.

II

ARGUMENT

It is the intent of this panel of the Court of Appeals for the Ninth Circuit to avoid the repetition of piecemeal appeals of the conviction and death sentence of Charles Rodman Campbell. It was this intent that led this panel to enter in the *Campbell v. Blodgett* appeal, No. 89-35210, its order of February 21, 1991 and its order of August 7, 1991. In the first petition for habeas corpus before the United States District Court, Campbell raised issues that had not been ruled upon by the Washington Supreme Court, which he was required to delete in order to avoid dismissal of the petition. The petition on the remaining exhausted issues was considered and denied by the United States District Court; the denial was affirmed by a panel of the Court of Appeals for the Ninth Circuit; the petition for rehearing and suggestion for en banc consideration was denied; then a petition for certiorari was denied by the United States Supreme Court. Four years had passed since the entry of the order by the Washington Supreme Court denying Campbell's personal restraint petition.

Campbell's second state personal restraint petition raised the unexhausted issues that had not been considered by the Washington Supreme Court. We must observe that the zeal of the Washington Attorney General's Office in pressing for a quick resolution of Campbell's first petition without allowing a few weeks to assure that all of the issues were considered, in the first instance, by the Washington Supreme Court, is why we are now faced with subsequent petitions after four years of legal procedures dealing with the first petition. Our panel is now confronted with a similiar situation. The Attorney General presses us to proceed with the appeal of the denial of the second federal petition knowing that a third federal petition is pending.

The second state personal restraint petition was denied by the Washington Supreme Court. Thereafter, a second petition for habeas corpus before the United States District Court was denied.

The appeal of that order is presently before our panel. However, a third personal restraint petition was filed and considered by the Washington Supreme Court while the appeal of the second federal petition for habeas corpus was pending before our panel. This state petition raised issues that the Washington Supreme Court treated as substantial and not frivolous. Counsel was appointed, a briefing schedule set, and oral argument held. If the state petition were to have been granted, the appeal before our panel would have been moot. If the petition were to have been denied, a petition for habeas corpus to the United States District Court was virtually assured. Thus, submission of the appeal of the denial of the second federal petition was withdrawn at that time by our panel.

The Washington Supreme Court has since denied the third state petition, with a dissenting opinion. Thereafter, Campbell, in his pro se response to our order requiring a status report, stated his intention to file a third petition for a writ of habeas corpus in the United States District Court, raising the issues that had just been ruled upon by the Washington Supreme Court. He represented he intended to make this his final petition.

This panel did not invite Campbell to file an additional petition for habeas corpus, as incorrectly represented by the Washington Attorney General's Office, but set a time limit for him to file the petition that he has indicated he intended to file pro se. See Petitioners' Appendix E; *Campbell v. Blodgett*, 940 F.2d 549, 550 (9th Cir. 1991). The time was extended for good cause. The petition has been filed in the United States District Court and a briefing schedule has been set.

Whether the third federal petition is granted or denied, it is virtually certain that there will be an appeal to this court, either by Campbell or by the State. It is the opinion of this panel that the most efficient and expeditious method of considering this case is to consolidate all of the issues remaining to be decided concerning the conviction and death sentence of Charles Rodman Campbell in this one appellate proceeding. No purpose is to be served by deciding the appeal of the second petition for habeas corpus, only to leave the order granting or denying the third petition to trail in a subsequent appeal.

In our dual sovereignty system of government, delays occasioned in processing of the appeals of convictions involving the death penalty are inevitable, but improvement can be made. The Ninth Circuit formed a Death Penalty Task Force, with representatives of the state prosecutors, defense attorneys, and the courts to develop improved procedures in the federal courts to avoid unnecessary delays. One of the major objectives identified by the Task Force is to strive to eliminate successive habeas corpus petitions by assuring that all issues are developed and considered in the initial habeas corpus proceedings. Although this case has proceeded well beyond that point, it is at least possible to assure that the appeals of the remaining two petitions are consolidated. It is with this in mind that our panel entered the orders withdrawing submission pending the District Court's decision on the third petition for habeas corpus and any appeal thereof.

Although the Attorney General suggests that this panel should have dismissed the second petition on the basis of the recent decision of *McCleskey v. Zant*, ____ U.S. ___, 111 S. Ct. 1454 (1991), no motion or brief to that effect has been filed by the Attorney General raising this contention. We, of course, are fully aware of the *McCleskey* decision, and recognize that its applicability to Campbell's second or third petition may well become an issue for our consideration. If properly raised and briefed, the applicability of *McCleskey* and its recent interpretation by a panel of our court in *Harris v. Vasquez*, 943 F.2d 930, 945-46 (9th Cir. 1991), will be fully considered.

Other cases in the future, with other procedural histories and different procedural backgrounds, may well call for other appellate procedural decisions. However, with the current posture of this case, we deem the procedure adopted to be the most expeditious.

III
CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of mandamus.

Dated this 18th day of November 1991.

Circuit Judges PROCTER HUG,
CECIL F. POOLE and
CYNTHIA HOLCOMB HALL

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